

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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IN RE: NORTH SEA BRENT CRUDE OIL)	CIVIL ACTION NO. 1:13-MD-02475-ALC
FUTURES LITIGATION)	
)	HON. ANDREW L. CARTER, JR
)	
	x	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF DAVID HARTER’S
MOTION FOR APPOINTMENT OF INTERIM LEAD PLAINTIFF
AND INTERIM CO-LEAD COUNSEL**

Plaintiff David Harter (“Harter” or “Plaintiff”) hereby respectfully submits this Memorandum of Law In Support of the Motion of Plaintiff David Harter for an Order appointing him Interim Lead Plaintiff and appointing Morgan & Morgan, P.C. (“Morgan & Morgan”), Fenet Law LLC (“Fenet Law”), and Edwards Kirby LLP (“Edwards Kirby”) as Interim Co-Lead Counsel for the Class described in Plaintiff’s complaint as:

All landowners (whether onshore or offshore) in Louisiana, Texas or any state in North America of oil producing property, oil lease owners, royalty or working interest owners, persons, business or entities (other than Defendants and any parent, subsidiary, affiliate, or agent of any Defendant) that purchased or sold Crude Oil during the period of at least 2002 through the Present (the “Class Period”).

Plaintiff’s Complaint at ¶36. This putative class is referred to herein as the “Oil Producing Class.”

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff’s cause of action arises from a conspiracy of the world’s largest energy companies to fix, raise, maintain and/or stabilize prices in restraint of trade and to manipulate intentionally prices of North Sea Brent Crude Oil (“Brent Crude Oil”) from at least January 1, 2002 through the period of the filing of Plaintiff’s complaint. Under this conspiracy, the

Defendants agreed amongst themselves deliberately to report inaccurate information regarding Brent Crude Oil prices to Platts, the leading global provider of spot and contract pricing for the physical and financially-settled derivative Brent Crude Oil prices.

On May 27, 2013, Plaintiff Harter filed a Class Action Complaint against BP PLC, Royal Shell, PLC, Statoil PLC, and John Does 1-20, alleging breaches of the Commodity Exchange Act, and the United States' antitrust laws on behalf of the aforementioned class in the Middle District of Louisiana. *Harter v. BP, PLC, et al.*, 3:13-cv-00337.

On May 22, 2013, Prime International Trading filed a Class Action Complaint in the Southern District of New York against BP PLC, Royal Dutch Shell PLC, Statoil ASA and John Does Nos. 1-50, alleging breaches of the Commodity Exchange Act, the United States' antitrust laws, and unjust enrichment, on behalf of a class described as "All persons or entities...that purchased or sold a Brent Crude Oil futures contract on the NYMEX or ICE during the period of at least 2002 through the Present (the "Class Period"). *Prime International Trading v. BP PLC., et al.* 1:13-cv-03473, Dkt. No. 1 at ¶68.

On May 28, 2013, Michael Sevy filed a Class Action Complaint in the Southern District of New York against BP PLC, Royal Dutch Shell PLC, Statoil ASA and John Does Nos. 1-50, alleging breaches of the Commodity Exchange Act, the United States' antitrust laws, and unjust enrichment, on behalf of a class described as "All persons or entities...who purchased or sold a Brent Crude Oil futures contract on the NYMEX or ICE during the period from January 1, 2002 to the present (the "Class Period"). *Sevy v. BP PLC, et al.*, 13 CIV 3587, Dkt. No. 1 at ¶110.

On June 10, 2013, Gregory Smith filed a Class Action Complaint in the Southern District of New York against BP PLC, Royal Dutch Shell PLC, Statoil ASA and John Does Nos. 1-50, alleging breaches of the Commodity Exchange Act, the United States' antitrust laws, and unjust

enrichment, on behalf of a class described as “All persons or entities...that purchased or sold a Brent Crude Oil futures contract on the NYMEX or ICE during the period of at least 2002 to the present.” *Smith v. BP PLC, et al.*, 1:13-cv-03944, Dkt. No. 1 at ¶62.

On June 14, 2013, Patricia Benvenuto filed a Class Action Complaint in the Southern District of New York against BP PLC, Royal Dutch Shell PLC, Statoil ASA, and John Does Nos. 1-50 alleging breaches of the Commodity Exchange Act and the United States’ antitrust laws on behalf of a class described as “All persons or entities...that purchased or sold one or more Brent Crude Oil Futures Contract(s) during the Class Period.” *Benvenuto v. BP PLC., et al.*, 1:13-cv-04142, Dkt. No. 1 at ¶134.

On July 1, 2013, White Oaks Fund, LP filed a Class Action Complaint in the Southern District of New York against BP PLC, Royal Dutch Shell PLC, Statoil ASA, and John Does Nos. 1-50, alleging breaches of the Commodity Exchange Act, the United States’ antitrust laws, and unjust enrichment on behalf of a class described as “All persons or entities...that purchased or sold a Brent Crude Oil contract on the NYMEX or ICE during the period of at least 2002 through the Present (the “Class Period.”) *White Oaks Fund v. BP PLC., et al.*, 1:13-cv-04553, Dkt. No. 1 at ¶92.

Each of the aforementioned cases was consolidated into 1:13-md-02475 by the Judicial Panel on Multidistrict Litigation (“JPML”), and this action was transferred by the JPML to the Southern District of New York.

For the reasons set forth below, Harter respectfully submits that the Court should appoint him as Interim Lead Plaintiff on behalf of the Oil Producing Class.

II. IT IS IN THE BEST INTEREST OF THE OIL PRODUCING CLASS TO APPOINT HARTER AS LEAD PLAINTIFF

Of the six actions currently consolidated and pending before this Court, only Harter has filed on behalf of the Oil Producing Class; the other five actions each purport to represent persons who bought Brent Crude Oil Contracts on the NYMEX or ICE. Thus, while the cases will share factual and legal similarities, Harter seeks to represent a different putative class, and is the only party who has stepped forward on behalf of the putative Oil Producing Class.

Harter and his family members have been in the oil and gas business for over 60 years and thus Harter has longstanding professional and economic interests in this litigation and the oil and gas business as a whole. Harter will be a zealous advocate on behalf of the Oil Producing Class. Accordingly, Harter respectfully submits that he should be appointed Interim Lead Plaintiff on behalf of the Oil Producing Class.

III. IT IS IN THE BEST INTEREST OF THE OIL PRODUCING CLASS TO APPOINT MORGAN & MORGAN, FENET LAW, AND EDWARDS KIRBY AS INTERIM CO-LEAD CLASS COUNSEL ON BEHALF OF THE OIL PRODUCING CLASS

FRCP Rule 23(g) (3) states that “[t]he court may designate interim counsel to act on behalf of a putative class before determining whether to certify the class action.” This provides the Defendants, the Court, and the Plaintiff with one voice to speak efficiently and authoritatively on the Class’ behalf. Only Harter has filed on behalf of the Oil Producing Class.

Rule 23 does not explicitly provide specific criteria for the Court to evaluate in appointing interim class counsel. Therefore, when selecting interim class counsel, courts are typically guided by the specific criteria of Rule 23(g) (1) (A) governing the selection of class counsel. *See In re Bear Stearns Co., Inc. Sec. Derivative and ERISA Litig.*, No. 8 MLD 1963, 2009 WL 50132 at *11 (S.D.N.Y. Jan 5, 2009). Under Rule 23(g) (1) (A), the Court must consider: (a) the work counsel has done in investigating potential claims in the action; (b)

counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (c) counsel's knowledge of the applicable law; and (d) the resources that counsel will commit to representing the class. Plaintiff respectfully submits that his chosen counsel of Morgan & Morgan, Fenet Law, and Edwards Kirby are best able to represent the class under the Rule 23(g) factors.

A. Morgan & Morgan

The members of Morgan & Morgan's class action litigation group have successfully prosecuted complex class actions and have been lead counsel in numerous landmark and precedent-setting class actions. *See Exhibit A to the Declaration of Peter Safirstein In Support of Plaintiff David Harter's Motion for Appointment of Interim Co-Lead Counsel* ("Safirstein Decl.").

Moreover, proposed Interim Co-Lead Counsel for Plaintiff are experienced class action litigators, have been appointed sole or co-lead counsel in numerous class actions, and have significant resources to effectively prosecute this litigation to the end to secure all possible benefits for the Oil Producing Class. Peter Safirstein ("Safirstein"), who co-chairs Morgan & Morgan's class action antitrust practice, has extensive experience litigating antitrust class actions. Among other cases, he has served as counsel in the following antitrust actions:

- *Blessing v. Sirius XM Radio, Inc.*, S.D.N.Y. (Case No. 09-cv-10035) (settled for \$180 Million) (Co-lead Counsel);
- *In re Korean Air Lines Co., Ltd Antitrust Litigation*, (C.D. Cal., Case No. 07-cv-05107) (settled for \$21 Million);
- *In re Potash Antitrust Litigation*, N.D. Ill., (Case No. 1:08-cv-6910) (direct purchaser class settled for \$80 Million and Indirect purchaser class settled for \$17.5M)
- *Church & Dwight Co., Inc. v. Mayer Laboratories, Inc.*, (N.D. Cal., Case No. 3:10-cv-04429) (private action);
- *In re Cathode Ray Tube (CRT) Antitrust Litigation*, (N.D. Cal., Case No. MDL No. 1917);
- *In re Transpacific Passenger Air Transportation Antitrust Litigation*, (N.D. Cal., No. 3:07-cv-5634);

- *In re Processed Egg Products Antitrust Litigation*, (E.D. Pa., Case No. 2:08-md-02002);
- *L'Ottavo Ristorante et al. v. Ingomar Packing Co. et al.*, (E.D. Cal., Case No. 09-cv-01945);
- *In re Fresh & Process Potatoes Antitrust Litigation*, (D. Idaho, Case No. 4:10-md-2186);
- *In re Electronic Books Antitrust Litigation*, (S.D.N.Y., Case No. 1:11-md-02293); and
- *In re Lithium Ion Batteries Antitrust Litigation*, (N.D. Cal., Case No. 4:2013-md-02420).

Safirstein, who heads Morgan & Morgan's New York office, has practiced in complex litigation for over 20 years. He formerly served in the United States Attorneys' Office for the Southern District of Florida and in the United States Attorneys' Office for the Southern District of New York. He serves on the ABA Class Actions and Derivative Suits Committee.

The co-chair of Morgan & Morgan's antitrust class action litigation group is Christopher Polaszek ("Polaszek"), who has also served a prominent role in numerous class actions. Polaszek is or has been a member of the Federal Bar Association, Tampa Bay Inn of Court, American Bar Association, Association of Trial Lawyers of America, and the Public Investors Arbitration Bar Association.

Morgan & Morgan has the resources required to lead this complex litigation to conclusion. As the United States' largest plaintiffs' firm, Morgan & Morgan has more than 200 lawyers, and a support staff of over 1,000 people, with offices in New York, Florida, Georgia, Mississippi, Kentucky, and Tennessee, and has obtained multi-million dollar verdicts in courts throughout the country. Just recently, Morgan & Morgan participated in a settlement with British Petroleum arising out of the Deep Horizons oil spill. Morgan & Morgan also recently completed litigation arising out of longstanding discrimination against a class of black farmers by the Department of Agriculture. A more comprehensive description of attorneys' qualifications and credentials, as well as more information about Morgan and Morgan, can be found in the firm resume annexed to the Safirstein Declaration as Exh. A.

B. Fenet Law

Robert Wickliffe Fenet is a native of Lake Charles, Louisiana. Mr. Fenet studied law at the Notre Dame Law School at the University of London, England, and Louisiana State University (LSU) Law School. He received his Juris Doctorate of Law from LSU Law School in 1972. Following Law School, he pursued post-graduate work in France, receiving the Certificat de Langue Francaise from the University of Paris (Sorbonne), and the Certificat Pratique de Langue Francaise from the University of Grenoble.

Mr. Fenet worked as a Law Clerk for the Honorable Minos D. Miller on the Third Circuit Court of Appeals, and also for the Judges of the 14th Judicial District Court in Lake Charles, Louisiana. He has practiced law for 30 years and is presently a founding partner of the Fenet Law Firm with offices in Baton Rouge, Louisiana.

Mr. Fenet is a veteran of litigation wars, having litigated cases from the Multnomah County Court in Portland, Oregon to San Juan, Puerto Rico, to Boston, Massachusetts to Cookville, Tennessee, to Houston Texas, to Savannah, Georgia, to Hartford Connecticut, to Tupelo Mississippi and points in between in the last 30 years. He has over 70 reported cases on Westlaw and has been admitted to practice law in the Western District, Middle District and Eastern District of the Federal Courts in the State of Louisiana, the Southern District of Texas, the Eastern District of Texas, the Northern District of Mississippi, the Eleventh Circuit Court of Appeal, the First Circuit Court of Appeal, the Fifth Circuit Court of Appeal, along with the United States Supreme Court.

He has been involved in all classes of commercial litigation. Mr. Fenet's father was an ardent "Longite" or supporter of Huey Long. Governor and Senator Huey Long had a lifelong battle with Standard Oil Company and John Rockefeller over the rights of the average citizen to

stand up to the big oil companies. Mr. Fenet's experience in trying cases involving the oil and gas industry and his passion to carry this case through to conclusion will greatly benefit the proposed class. The resume of Fenet Law with the firm's list of reported cases is attached to the Safirstein Declaration as Exhibit B.

C. Edwards Kirby

Edwards Kirby is led by John Edwards, a former U.S. Senator from North Carolina, the 2004 Democratic Vice-Presidential nominee, and a former candidate for President of the United States. Edwards began his career as a law clerk for federal judge Franklin Dupree, before entering private practice, where he built a reputation as an advocate in a wide range of products liability and medical malpractice case. In *Lahey v. Sta-Rite Industries* (Wake Co. Superior Ct., NC, 1996), on behalf of his clients Edwards received a \$25 million products liability verdict, the largest such verdict in North Carolina history up to that point. Edwards has been the recipient of numerous accolades, including earning the Association of Trial Lawyers of America's national award for public service, and election to The Inner Circle of Advocates, a group of the nation's top 100 trial lawyers. Edwards litigation skills have made national headlines, the *New York Times* called Edwards "an exceptionally talented lawyer, endowed with a prodigious work ethic."

David Kirby is consistently recognized as one of the most outstanding and accomplished trial lawyers in the United States. Kirby has worked on a number of high-profile cases, ranging from workplace safety to products liability actions. Kirby's accomplishments have been recognized by his peers, including being named Lawyer of the Year by *Lawyers Weekly, USA* in 2012. Kirby is a Lifetime Inductee in the William Horn Battle Society of the University Of North Carolina School Of Law.

The experience and successes of Morgan & Morgan, Fenet Law, and Edwards Kirby in

this type of litigation weigh in favor of appointing them as Interim Co-Lead Counsel.

IV. CONCLUSION

Based on the foregoing, Harter respectfully requests that the Court appoint him as Interim Lead Plaintiff and Morgan & Morgan, Fenet Law, and Edwards Kirby as Interim Co-Lead Counsel for the putative Oil Producing Class.

Date: November 20, 2013

Respectfully Submitted,

/s Peter Safirstein

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[Proposed] Interim Co-Lead Counsel